CTAP CASELAW UPDATES[1] – MAY 2008

By Michael C. Doggett, Legal Intern
Community Technical Assistance Program
Montana Department of Commerce

Planning, Zoning and Subdivision Law

North Pacifica LLC v. City of Pacifica (9th Circuit, on appeal from the United States District Court for the Northern District of California, May 13, 2008)

Summary:

(1) A developer's substantive due process rights are not violated if delays in the city's processing of its application through requests for more information are relevant, and allow the city to conduct a more thorough review;

(2) A developer who sues a local government agency for an equal protection violation cannot be awarded damages when the contract between the agency and developer contains a clause that has never been applied to any other developer if:

(1) The city uses outside counsel to draw up the contract between the developer and the city;
(2) The City Council does not know that the contract clause is unique; and
(3) The developer does not object to the contract clause before the Council approves the contract.

"This case arises from a complicated series of events illustrating the friction that can grow between a developer trying to secure approval of a condominium project as quickly as possible, and a city trying to use development permit procedures to avoid all foreseeable future problems."

A developer, North Pacifica LLC, originally sued the City of Pacifica for delays in approving its application for development, but because of a citizen's appeal to the Coastal Commission, the development is still on hold after the city's approval. North Pacifica also filed another suit relevant to this case in state court against the City to require it to maintain an abandoned road abutting North Pacifica's property.

The district court initially dismissed North Pacifica's delay-based substantive due process claim as not ripe because North Pacifica had not yet finished seeking compensation in state court. However, the Court granted North Pacifica the opportunity to file a supplemental complaint alleging that a condition in the contract between North Pacifica and the City was imposed in violation of equal protection. The district court entered judgment for the developer for approximately $650,000 on the equal protection claim, which the City appealed.

[1] Disclaimer – This information is not intended to constitute legal advice and should not be relied upon or used as a substitute for consultation with your own, your agency's, or your organization's licensed attorney. These case summaries are provided as technical assistance to county, municipal, state, and regional planning commissions, zoning commissions, parks or recreation boards, community development groups, community action agencies, and similar agencies created for the purposes of aiding and encouraging orderly, productive, and coordinated development of the communities of the state and to assist local governments in discharging their responsibilities.

In its decision, the Court acknowledged the unpredictable nature of substantive due process law in the context of land-use regulation, calling it a "treacherous field" for litigants. In its analysis, the Court adopted the Lingle test articulated by the U.S. Supreme Court (Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)) that a challenge to land use regulation may state a substantive due process claim if the regulation serves no legitimate governmental purpose because it lacks "any substantial relation to the public health, safety, or general welfare."

North Pacifica alleged that the City violated its substantive due process rights by repeatedly requesting more information, which delayed the processing of its application. Pursuant to Lingle, North Pacifica had the burden of proving that the requests for information were not "so arbitrary or irrational" that they violated the Due Process Clause. To support its position, the City showed what the Court characterized as a reasonable explanation for every delay in its eventual approval of the application, leading both the district and the 9th circuit courts to find for the City on North Pacifica's substantive due process claim.

With respect to its equal protection claim, the court held that North Pacifica had the burden of showing that the City intentionally, and without rational basis, treated North Pacifica differently from others similarly situated with conduct directed solely at North Pacifica. The Court found for the City and dismissed North Pacifica's claim for three reasons: (1) the City hired outside counsel to draw up its contract with North Pacifica, and did not intend to insert the provision at issue; (2) the City Council did not know the contract clause had never been applied to another developer, and didn't receive North Pacifica's complaint about the condition prior to a hearing on the permits; and (3) North Pacifica never objected to the condition at the Council hearing before the Council approved the objection and, after they did learn of North Pacifica's objection to the condition, they removed it from the contract.

Willoughby Development Co., et. al v. Ravalli County (U.S. District Court for the District of Montana, Missoula Division, CV 07-002-M-DWM, May 15, 2008, Judge Donald Molloy presiding)

Summary: Land developers in Ravalli County applied for subdivision permits. Ravalli County did not find the applications either complete or sufficient within the statutorily prescribed deadlines, and later refused to process the applications when they did not conform to interim zoning requirements adopted by Ravalli County voters. The federal district court held that the applicants were not deprived of any Federal liberty or property interests protected by the U.S. Constitution.

The plaintiffs, who are all land developers in Ravalli County, each bought real property in the County, and submitted subdivision applications. After the applications were submitted, Ravalli County failed to process them under a sufficiency review or completeness review in a timely manner as required by state law (MCA 76-3-604) and Ravalli County Subdivision Regulations. During this time, Ravalli County adopted an official policy that absent a positive sufficiency determination made prior to October 1, 2006, subdivision applications would be subject to new regulations not yet adopted (interim zoning). The county informed the plaintiffs that a decision by the voters of Ravalli County to limit new subdivisions to a density of one residence per two acres would apply to the plaintiffs' subdivision applications, despite a state statute requiring the County to apply the zoning regulations in effect when a subdivision application is filed. Mont. Code Ann. § 76-3-604(8)(a).

The Plaintiffs filed suit in federal court, alleging that Ravalli County's retroactive application of the interim zoning deprived plaintiffs of substantive and procedural due process and constituted a taking of their property. Motions for summary judgment were filed by both sides. After considering the motions, the Court granted Ravalli County's motion for summary judgment on all of its federal claims, ruling that: (1) under the U.S. Constitution, the 2005 Ravalli County Subdivision Regulations do not create a protected property or liberty interest in approval of subdivision applications; (2) plaintiffs' statutory right to review under Ravalli County's 2005 Regulations is not sufficient to create a property interest protected by the U.S. Constitution; (3) the interim zoning regulations approved by Ravalli County voters did not sufficiently deprive the Plaintiffs of their right to engage in the common occupation in the field of residential real estate to invoke the protections of the Due Process Clause; (4) Plaintiffs had no reasonable expectation of entitlement based on reliance on the approval of their applications; and (5) Plaintiffs' decision to pursue litigation and let their property lay fallow is not a taking.

In its decision to grant summary judgment for the City, the Court noted that a plaintiff must first identify a liberty or property interest protected by the U.S. Constitution to succeed on a due process claim. This protected property interest is not created merely because an individual has an abstract need or desire for, or expectation of, an entitlement. Rather, an entitlement is determined by the language of the statute allegedly creating the entitlement, and the extent to which it is couched in mandatory terms. Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F.3d 56.

The Court relied heavily on Kiely Construction, L.L.C. v. City of Red Lodge, 57 P.3d 836 (Mont. 2002) to broadly sketch out why Ravalli County's 2005 subdivision regulations do not create a protected property or liberty interest in Plaintiffs' approval of their subdivision applications. In Kiely, the plaintiff brought suit against Red Lodge, alleging due process violations based on the municipality's failure to approve their subdivision application. In its decision, the Montana Supreme Court found that statutes mandating subdivision review create an entitlement if they "set out conditions under which the benefit must be granted, or the only conditions under which the benefit may be denied." The proper focus for determining a protected property interest in an entitlement is on the degree of discretion given to the decisionmaker, not the probability of the decision's favorable outcome.

After applying its holding in Kiely to the Ravalli County dispute, the Court determined that Montana statutory provisions vested Ravalli County with significant discretion without restraining its decisionmaking, and therefore did not create a legitimate claim of entitlement to the approval of a subdivision application under MCA § 76-3-608, which remained largely unchanged from the time of the Kiely decision. The Montana Subdivision and Platting Act (MSPA) gives local governing bodies discretion to be consider the effects of proposed subdivisions on: agriculture; agricultural water-use facilities; local services; natural environment; wildlife and wildlife habitat; public health and safety; and permits the governing body to require a subdivider to reasonably mitigate potentially significant adverse impacts by reducing the number of lots, relocating roads, requiring ground water monitoring or soil testing, and density.

Although the Plaintiffs had a statutory entitlement to review of their applications, the Court found that their statutory right to review was not protected by the U.S. Constitution. The Court applied both Jacobson v. Hannifin, 627 F.2d 177, and Nunez v. City of Los Angeles, 147 F.3d 867 to

establish that the 2005 Ravalli County Subdivision Regulations and MCA § 76-3-501(2)'s requirement that the governing body apply the regulations in effect at the time of a subdivision application's filing do not vest the Plaintiffs with a constitutionally protect property interest, or substantially limit Ravalli County's discretion to approve or deny a subdivision application.

The court also rejected the plaintiffs' claim that they were deprived of their liberty interest in engaging in a common occupation of life—specifically the development and marketing of residential real estate—noting that the Plaintiffs have not been banned from developing or marketing residential real estate in Ravalli County or elsewhere. Therefore, the new density restrictions imposed on them by the zoning regulations did not sufficiently foreclose their range of employment opportunities in residential real estate to invoke the protections of the Due Process Clause.

Finally, the court rejected the plaintiffs' takings claim, noting that the claim was extraordinary in that it did not allege diminution in value, but rather asserted that Ravalli County's retroactive application of the interim zoning resulted in a temporary taking during the time the Plaintiffs had to wait for a determination of their rights in litigation. Noting that loss is a risk "inherent in the process", the Court held that a takings claim based on a decision to let property lay fallow while pursuing other claims related to the property "would be senseless and invite excessive litigation."

Although the Court's decision eliminates the Plaintiffs' case in federal court, the Court left open the opportunity for the parties to decide the remaining state law claims: that the density bylaw should be declared null and void because Ravalli County exceeded its authority under the Montana constitution and state law by adopting a zoning ordinance that applied retroactively for more than ninety days; and that the retroactive application of the density bylaw to Plaintiffs' subdivision applications was arbitrary and capricious in violation of Mont. Code Ann. § 76-3-625.

Environmental Law

Nog, LLC et al. v. Montana Department of Environmental Quality (Montana District Court, First Judicial District, Lewis and Clark County, ADV-2008-354, May 1, 2008, Honorable Dorothy McCarter presiding)

Summary: If the Montana Department of Environmental Quality (DEQ) accepts an application for an opencut mine pursuant to § 82-4-43 MCA, DEQ must issue the permit, and the successful permit applicant does not have to wait for DEQ to complete an environmental assessment following the accepted application.

The second of three gravel pit decisions issued by the First District Court in the past two months. The plaintiffs applied for permits from Department of Environmental Quality (DEQ) to operate opencut gravel pit mines in Gallatin County. The Department of Environmental Quality (DEQ) received the applications and determined that they were "acceptable" in accordance with § 28-4-432, MCA. As of the filing of the lawsuit, DEQ had not completed the required environmental assessment under MEPA for either application, and was unable to state when the process would be completed. In response to the delays, the plaintiffs filed writs of mandamus asking DEQ to issue the permits immediately.

In its decision, the court relied substantially on *Cameron Springs, LLC, v. Mont. Dep't of Envtl. Quality* (*see* CTAP Legal Update, April 2008) by fully adopting its analysis for granting a writ of mandamus. As in *Cameron Springs*, court again held in the instant case that DEQ was not authorized to withhold permits pending environmental assessments, and MCA 82-4-432(4)(d) required that once an application is acceptable under the many factors contained in MCA 82-4-434, DEQ must issue the permit.

The Court further noted that DEQ is severely backlogged, which would make the applicants' waiting time for an environmental assessment significant, and zoning changes being considered by the Gallatin County Commissioners could further affect the proposed gravel pit mining operations, offering the plaintiffs no legal remedy without the speedy granting of DEQ permits.

Three Way Mining v. DEQ (Montana District Court of the First District, ADV-2008-383, May 13, 2008, Honorable Dorothy McCarter presiding)

Summary:

(1) A Department of Environmental Quality (DEQ) decision to accept an application for an opencut gravel mining operation obligates the agency to issue a permit;

(2) If DEQ takes more than the 60 days it is statutorily given to evaluate an application, it must immediately review the application regardless of whether new zoning regulations passed by a county restrict the ability of the mine to carry out its operations.

The third of three gravel pit decisions issued by the First District Court in the past two months. Three-Way Mining submitted three applications for gravel pits in Gallatin County: an amendment to its existing Storey Pit opencut mining permit; an amendment to its existing Nuss Pit opencut mining permit; and an application for a new opencut mining permit for the Morgan Family LLC Pit. The DEQ accepted the first application, but had not yet ruled on the other two applications by the filing of the lawsuit.

Despite DEQ's argument that it did not have enough time to do environmental assessments within 60 days because it is understaffed, the court again held that the statute is clear in its requirements that DEQ must make an assessment of the application based on the criteria in MCA 82-4-432 within 60 days, and immediately issue permits for Three-Way Mining's approved application. Because of zoning changes going into effect in Gallatin County, the Court determined that there would be no speedy remedy in a lawsuit by Three-Way mining against DEQ, and ordered the agency to make decisions regarding the other two pending applications immediately without considering the new zoning restrictions passed after the statutorily mandated DEQ review period.

Our Children's Earth Foundation v. EPA (9th Circuit Court, D.C. CV-04-02132-PJH, on appeal from the District Court of the Northern District of California, May 32, 2008)

Summary: Decisions about whether to revise effluent guidelines and incorporate technology-based review criteria pursuant to the Environmental Protection Agency's mandatory periodic review of Clean Water Act statutory guidelines fall within the Environmental Protection Agency's discretion.

In 1972, Congress passed the Clean Water Act (CWA) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Central to the legislation is the notion that pollution discharges would be controlled through technology-based effluent limitations. A technology-based approach to water quality focuses on the achievable level of pollutant reduction given current technology.

Our Children's Earth Foundation and other environmental organizations (OCE) filed a citizen suit under the Clean Water Act (CWA) alleging that the Environmental Protection Agency (EPA) failed to fulfill its federal administrative, procedural mandate to review effluent guidelines and limitations in a timely manner, and in accord with technology-based standards. Specifically, OCE maintains that EPA violated its statutorily-mandated duties by: abandoning technology-based review in favor of hazard-based review; neglecting to identify new polluting sources; and failing to publish timely plans for future reviews.

A hazard-based approach seeks to identify known hazards or contaminants in the water and reduce the prevalence of those hazards. Although the technology-based and hazard-based approaches are not mutually exclusive, OCE claims that EPA abandoned a technology-based approach altogether, violating its statutory duties in: §301(d) requiring EPA to review, every five years, the effluent limitations establish under §301(b)(2) "if appropriate"; and §§ 304(b) and (m) requiring annual review of guidelines for effluent limitations applicable to direct dischargers and revision "if appropriate".

In its decision, the Court broadly sketches out the history and statutory framework of the Clean Water Act, noting that the statute gives the EPA discretion on whether or not to revise guidelines and limitations on pollutants, and must be in accord with detailed statutory criteria incorporating variants of the best-technology standard. It provides two avenues for Clean Water Act challenges: § 509(b)(1) actions challenging the exercise of the Administrator's discretion in promulgating standards and issuing determinations, and 505(a)(2) actions permitting "any citizen to commence a civil action on his own behalf…against the administrator where there is alleged a failure of the Administrator to perform any act or duty which is not discretionary." Because the Plaintiffs' challenge does not stem from the promulgation or approval or an effluent limitation or permit, the court did not need to decide the challenge under § 509(a)(2).

In its examination of OCE's § 505(a)(2) challenge, the court found that, even though the CWA's structure strongly suggests that any review to determine whether revision of its standards is appropriate should contemplate mandatory technology-based factors, the statutory provisions of § 301 do not expressly and unequivocally state that the EPA is required to do so. The Court relied heavily on the specific language of the CWA requiring the revision of guidelines and limitations as "appropriate." Even though review of those guidelines is a non-discretionary, mandatory act, "nothing in the CWA specifically obligates the EPA to review the effluent guidelines and limitations using a technology-based approach" within statutory provisions considered by the Court to be "ambiguous."

United States v. The Wilderness Society (9th Circuit Court of Appeals, on appeal from the United States District Court for the District of Nevada, May 20, 2008)

Summary: After residents of Elko County, Nevada began improving a road near the Jawbone Wilderness Area without Forest Service approval, the U.S. Attorney General filed suit against Elko County, and eventually settled. In the settlement agreement between the U.S. and residents of Elko County, Nevada granted Elko County title to a road easement within the county. When environmental groups, including the Wilderness Society, found out about the settlement, they filed suit against the U.S. for violating administrative procedures regarding the granting of the easement. In its decision, the 9th Circuit Court held that the government's settlement is reviewable pursuant to federal laws such as the Administrative Procedure Act (APA), and the Wilderness Society was properly admitted as a party with a significant interest in the action.

This lawsuit was initiated after residents of Elko County began using "self-help" measures to restore an old logging road near a wilderness area without U.S. Forest Service (USFS) approval. At the time, the United States was concerned about the degradation of the Jawbridge Wilderness Area through the adverse effects of road construction on bull trout in the river adjacent to the roadway. The U.S. Attorney General alleged two causes of action in its lawsuit: unlawful take of threatened bull trout in violation of the Endangered Species Act; and common law trespass.

After the suit was filed, the U.S. eventually settled with Elko County. In the settlement, the U.S. agreed that it would not contest Elko County's right of way to the road, while Elko County agreed not to do any work on the road without prior approval from the Forest Service, and further agreed to comply with federal environmental laws, including NEPA and the Endangered Species Act. After the settlement terms became public, the Wilderness Society (TWS) and other environmental groups attempted to intervene in the settlement proceedings. The district judge denied intervention, but the environmental groups were eventually successful in their intervention into the Quiet Title proceedings pursuant to a 9th circuit court order compelling the district court to grant the intervention.

TWS challenged the terms of the settlement agreement as a violation of the National Environmental Protection Act (NEPA), the Federal Land Protection Management Act (FLPMA), and Forest Service regulations. The district court denied intervention in the Quiet Title claim, but stayed the settlement approval proceeding until the U.S. demonstrated that it complied with NEPA, FLPMA, and USFS regulations. When the judge who had been working on the case retired, a new judge took over the case and lifted the stay

In its ruling, the 9th Circuit Court upheld its prior holding, reasoning that the intervenors had an interest in seeing the wilderness preserved for the use and enjoyment of their members, in compliance with the 10th circuit decision in *San Juan County v. United States*, the only other circuit case to deal with intervention in a Quiet Title Act action. Although the intervenors' consent was not required for approval of the settlement between the parties asserting property interests, the Court vacated the settlement because the intervenors were not permitted to participate in the settlement review proceedings. The Court explicitly recognized that TWS did not have veto power over the settlement, but it did recognize that, since federal law had been violated in excluding TWS, the settlement was vacated to consider the contentions of TWS and other concerned parties.

The Court also dismissed the Attorney General's argument that final actions of discretionary decisions by the Attorney General are not reviewable, directly quoting under the Administrative Procedure Act ("APA") that "final actions of the Attorney General fall within the definition of agency action reviewable under the APA," especially when a claim alleges that that agency "exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations." *Guadamuz v. Bowen*, 859 F.2d 762, 767 (9th Cir. 1988). In its complaint, the Wilderness society also alleged that the Attorney General's authority to settle litigation stops "at the walls of illegality," and encouraged the Court to rule on the merits of their case, which the Court declined to do, remanding the case yet again.

National Resources Defense Council v. United States Environmental Protection Agency (9th Circ. Petition for Review of a Final Rule of the Environmental Protection Agency, May 23, 2008)

Summary: A June 2006 Environmental Protection Agency rule creating an exemption from storm water permitting requirements for discharges of sediment from construction activities associated with oil and gas exploration, production, processing, treatment operations or transmission facilities was vacated by the 9th Circuit Court as out of keeping with congressional intent and permissible statutory interpretation.

In June 2006, the Environmental Protection Agency (EPA) promulgated a rule regarding the regulation of storm water discharges associated with oil and gas facilities. The rule, codified in 40 C.F.R. § 122.26(a)(2)(ii), stated that the Director of the EPA could not require a permit from storm water discharges comprised solely of sediment from oil and gas construction activities, even if the discharges contributed to a violation of a water quality standard. This language directly conflicts with prior storm water rules adopted in 1990 that recognized the "potential for serious water quality impacts" from storm water runoff associated with oil and gas facilities, and that only operators using "good management practices" who made "expenditures to prevent contamination" should not be burdened with the requirement to obtain a permit—but only for "uncontaminated runoff from these facilities."

The permitting rules were further expanded in 1999 as part of EPA's Phase II storm water rule to include small construction sites (less than 5 acres), and in 2002, EPA determined that close to 30,000 oil and gas sites, annually, could be affected by the Phase II rule. In 2005, the Clean Water Act (CWA) was amended by the Energy Policy Act of 2005 to include:

> "All field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities."

To reflect the new storm water permit regulations, EPA modified the rule regarding runoff from oil and gas activities, effectively exempting "permits for storm water discharges comprised solely of sediment from oil and gas construction activities, even if such discharges contribute to a violation of a water quality standard," rationalizing that "sediment, being the pollutant most commonly associated with construction activity, is the very pollutant being exempted from permitting by the Energy Policy Act of 2005."

In response to its newly created rule, the National Resources Defense Council (NRDC) petitioned the 9th Circuit Court for direct review of the EPA's new rule. To analyze the new rule, the court examined two factors from the landmark case Chevron v. National Resources Defense Council (467 U.S. 837): whether Congress unambiguously expressed its intent on the issue before the court; and, if Congress' intent is ambiguous, if the agency's answer is based on a permissible construction of the statute.

The Court concluded that Congress did not unambiguously intend to exempt discharges of storm water runoff contaminated solely with sediment from NPDES permitting requirements, as the EPA contends. At most, the Court noted, the statutory language indicated that oil and gas operations or facilities, which include construction activities, are exempt from permitting as long as the storm water runoff from those activities "is not contaminated with, or does not come into contact with, certain undefined contaminants: overburden, raw material, intermediate products, finished product, product, or waste product." Even if the Court were to accept the plaintiff's contention that sediment is "waste product" there is still no single, plain meaning for the term that either side can rely on, despite the opposition of the new designation in 2005 from several U.S. senators who predicted the EPA's interpretation of the statute.

Further, the EPA's own statements during its rule-making process prior to the passage of the Energy Policy Act of 2005 recognized that oil and gas construction sites were prime candidates for NPDES permitting in light of "serious water quality impacts" caused by construction storm water discharges polluted with sediment. Thus, the court held that its June 12, 2006 storm water discharge rule represents a complete departure from its previous interpretation of what constitutes contamination.

Center for Biological Diversity, et al. v. U.S. Forest Service (9th circuit on appeal from the United States district Court for the Eastern District of California, May 14, 2008)

Summary: A U.S. Forest Service policy to fund fire suppression efforts by selling trees to commercial loggers without considering other funding and fire suppression alternatives does not outweigh a state's interest in forest and species preservation, and may violate NEPA's requirement to "rigorously explore and objectively evaluate all reasonable alternatives," and the 9th Circuit Court reversed the denial of an injunction to halt the fire suppression efforts.

In 2005, a group of environmental organizations filed a lawsuit in response to the Supplemental Environmental Impact Statement (SEIS) issued by the U.S. Forest Service (USFS) in January 2004. The SEIS was as a supplement to the Final Environmental Impact Statement (FEIS) issued by USFS in 2001 for the Sierra Nevada Forest Plan Amendment to log three sites. Part of USFS' SEIS plan was to raise money for fire suppression by selling larger trees to commercial loggers. Although USFS admitted that one necessary step to cut down the incidence of forest fires is the removal of brush and small trees, they did not assert that it was necessary as a preventive measure to cut down the larger trees that provide habitat "in which various species thrive." Pending the outcome of the lawsuit, USFS announced that it intended to advertise and award logging contracts for those sites. The plaintiffs requested a preliminary injunction to stop the logging, which was denied by the district court on October 15, 2007.

To decide the merits of the SEIS, the Court confined itself to an analysis of whether USFS' plan to sell off the forest trees complied with the requirements of the National Environmental Policy Act (NEPA). Under NEPA, an agency cannot rely on a discussion of alternatives in a prior EIS if the circumstances "relevant to the development and evaluation of alternatives" change. In its decision, the Court determined that changed circumstances "plainly exist" between the 2001 FEIS and 2004 SEIS, including substantively new objectives for the reduction of forest fuels.

The court held that the agency did not consider several alternative methods to its fire reduction objectives (many of which were raised by the Attorney General of California), including: requesting a special appropriation from Congress; re-prioritizing other funding; and altering its fuel treatment program. As long as these options remained unexamined in the 2004 SEIS, NEPA's requirement was not satisfied.

Despite overturning the injunction after its discussion of NEPA, the Court does an equity balancing analysis of the legal merits of Sierra Forest's case to justify a preliminary injunction. The court balances the 2001 FEIS, 2004 SEIS, California's interest in preserving the sensitive spotted owl species from a permanent reduction in its habitat against the Forest Service's choice of funding for fire reduction, and concludes that the federal government has many avenues to obtain funding for fire suppression which must be adequately explored before a sensitive species' habitat is jeopardized.

United States, et. al. v. Manning, et. al. (9th Circuit, on appeal from the United States District Court for the Eastern District of Washington, May 21, 2008)

Summary: The 9th Circuit Court determined that a Washington state initiative designed to "prevent the addition of new radioactive and hazardous waste to the Hanford nuclear reservation until the cleanup of existing contamination is complete" was preempted by federal law because the initiative failed to distinguish between nuclear waste, which is covered by federal law, and non-nuclear waste, which can be regulated by states.

The Hanford Nuclear Reservation ("Hanford") in Washington State is one of the largest sites in the country for the treatment, storage and disposal of radioactive and non-radioactive hazardous waste, currently storing over 53 million gallons of mixed waste. During World War II, the U.S. government constructed Hanford to manufacture plutonium for military purposes, but its function has grown over the years. By 2004, 22,000 cubic meters of low-level mixed waste and radioactive waste awaited treatment and disposal at the site.

In 1989, Washington's Department of Ecology ("Ecology") and the United States Environmental Protection Agency ("EPA") entered into the Hanford Federal Facility Agreement and Consent Order to bring Hanford into compliance with federal and state environmental laws. According to Ecology, the Department of Energy and its contractors have been cited numerous times for violations of federal and state hazardous and mixed waste laws and requirements since the consent order.

In response to the issues at Hanford, the voters of Washington enacted an initiative to "prevent the addition of new radioactive and hazardous waste to the Hanford nuclear reservation until the cleanup of existing contamination is complete." The act did not differentiate between the different

types of wastes, making it part of a compilation of laws "for regulating materials that are variously described as hazardous, dangerous, radioactive, or having some combination of these attributes." The Act provided that a final facility permit could not be issued until all units of a facility were in compliance with federal and state cleanup laws, and that a facility could not import mixed waste until obtaining a permit. Under the final section of the act, the provisions within it were made enforceable through citizen lawsuits.

The district court granted summary judgment for the plaintiffs, ruling that the state act was preempted by federal law The Act improperly intruded on the field governed by the Atomic Energy Act by regulating byproduct, source, or special nuclear material, and failed to distinguish between nuclear and other wastes, which improperly intruded on the federal government's authority under the APA.

In upholding the decision of the district court, the 9th Circuit Court reiterated long-standing preemption doctrine, noting that a state law can be preempted in two ways: if "Congress evidences an intent to occupy a given field," or, if the field has not been occupied entirely, "to the extent it actually conflicts with federal law or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." The Court concluded that the Atomic Energy Act preempts Washington's Act and renders the Act unenforceable because (1) the purpose of the CPA is to regulate against radiation hazards, and (2) the CPA directly affects decisions concerning radiological safety.

United States v. W. R. Grace (9th Circuit Court, D.C. CR-05-00007-DWM, May 15, 2008)

Summary: (1) The 9th circuit court ruled that a United States Attorney's bare certification regarding delay and materiality was sufficient to give appellate jurisdiction to address the government's objections to the district court's orders, and (2) the district court had the authority to issue and enforce its pretrial orders compelling the government to disclose its witness list.

The result of this case is not the resolution of the W.R. Grace controversy, but it does push the criminal trial of W.R .Grace executives one step closer to resolution.

Punitive Damages

McKay v. Wilderness Development, LLC (Montana 19th Judicial District Court, Lincoln County, May 13th, 2008)

Note: This is a State District Court case which may or may not be appealed to the Supreme Court, and does not yet have strong precedential value. Information about this case was obtained through a court order of the 19th Judicial District Court (DV-07-158) and news articles giving a broader outline of the case than is found in the District Court's order. More information on the trial can be found at: http://www.kulr8.com/news/state/19124064.html

Summary: Defendant Wilderness Development, LLC, a large land developer in Lincoln County, constructed part of its 550 acre development in a subdivision named Koocanusa Estates. As part of the construction effort, the defendant deforested approximately 1/3 of an acre of the Plaintiffs' land to build a road to a

14,000 square foot structure constructed in violation of Koocanusa Estates covenants. After a trial, the jury found for the Plaintiffs for approximately 1.35 million dollars, including: $6,500 for the conversion of the Plaintiffs' timber; $350,000 for Wilderness' breach of Koocanusa Estates covenants; and $1,000,000 in punitive damages. In a post-verdict motion, the judge reduced the punitive damage award handed down by the jury from $1 million to $25,000, making the total verdict approximately $375,000.

In reducing the jury's punitive damage award, the court relied on the following guideposts: § 27-1-211(7) MCA; and Seltzer v. Morton, 336 Mont. 225 (adopted from State Farm Mutual Auto Ins. Co. v. Campbell (2003), 538 U.S. 408) to reduce the Plaintiffs' punitive damages award from $1 million to $25,000 by considering:

- The degree of reprehensibility of the Defendant's actions;
- The ratio of harm to Punitive Award;
- The existence of civil or criminal penalties available to sanction comparable conduct; and
- The guideposts set out in § 27-1-220(2) MCA.

In its consideration of the factors, the court found that:

- The converting of the Plaintiffs' timber by the Defendants did not evince a disregard for their health and safety;
- The Plaintiffs did not have to divert a great deal of their income to fight their legal battle with the Defendants;
- The Defendant's conduct involved a single incident by a corporation that thought it had a right of access to the property;
- Punitive damages are not available in a breach of covenant claim pursuant to Rientsma v. Lawson (1986), 223 Mont. 520 because that case was decided before the legislature amended MCA § 27-1-220 to exclude punitive damages for breach of contract, eliminating the $350,000 breach of covenant award from the court's consideration of punitive damages; and
- The ratio of conversion of timber damages to punitive damages was too high (approximately 154:1) to be enforceable.